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No. 82-1643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Interstate Commerce Commission may retroactively invalidate tariff rates that have become effective in accordance with the Interstate Commerce Act's provisions for establishing rates, but which are subsequently found to have been established in violation of an approved motor carrier rate bureau agreement.

PARTIES TO THE PROCEEDING

The following were original petitioners below and are respondents here: American Trucking Associations, Inc.; Central and Southern Motor Freight Tariff Association, Inc.; Central States Motor Freight Bureau, Inc.; Eastern Central Motor Carriers Association, Inc.; Middle Atlantic Conference; Middlewest Motor Freight Bureau; National Motor Freight Traffic Association, Inc.; New England Tariff Bureau, Inc.; Niagara Frontier Tariff Bureau, Inc.; Pacific Inland Tariff Bureau, Inc.; Rocky Mountain Motor Tariff Bureau, Inc.; and Southern Motor Carriers Rate Conference. The following were intervenors in support of the original petitioners below: Alaska Carriers Association, Inc.; Bulk Carrier Conference, Inc.; Drug & Toilet Preparation Traffic Conference, Inc.; Heavy & Specialized Carriers Tariff Bureau; Household Goods Carriers' Bureau, Inc.; Motor Carriers Traffic Association, Inc.; National Association of Specialized Carriers, Inc.; National Small Shipments Traffic Conference, Inc.; Ohio Motor Freight Tariff Committee, Inc.; and Steel Carriers' Tariff Association, Inc. The affiliates of respondent American Trucking Associations, Inc. are named in an attachment hereto.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-31a) is reported at 688 F.2d 1337. The decisions of the Interstate Commerce Commission (Pet. App. 32a-72a, 73a-84a, 85a-91a) are reported at 45 Fed. Reg. 55734, 46 Fed. Reg. 30092, and 364 I.C.C. 921.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 92a-93a) was entered on October 12, 1982. A petition for rehearing was denied on January 7, 1983 (Pet. App. 94a-95a). The petition for a writ of certiorari was filed on April 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

In the proceeding under review below, Ex Parte No. 297 (Sub-No. 5), *Motor Carrier Rate Bureaus—Implementation of P.L. 96-296*, the Interstate Commerce Commission promulgated a number of rules which purport to interpret and implement certain provisions of Section 14 of the Motor Carrier Act of 1980 governing the operations of rate bureaus. Respondents include the major motor carrier rate bureaus. These rate bureaus perform their functions under procedures set forth in agreements which are filed with the ICC and which, if they comply with the requirements and restrictions in Section 10706(b) of the Interstate Commerce Act, are required to be approved by the ICC. The ICC's approval of an agreement immunizes from "the antitrust laws" the "parties and other persons with respect to making or carrying out the agreement." 49 U.S.C. § 10706(b).

A typical agreement provides that any person may submit for collective action by the carriers, a proposal to establish or change a rate or rates in the bureau's tariffs. Notice of proposals are regularly distributed to all carrier members of the bureau and to all members of the public who subscribe to the bureau's docket bulletin. All proposals that would effect significant changes in rates are referred to a committee of carrier members.[1] Following a public discussion among carriers, shippers, and any other persons wishing to participate, the committee either approves, disapproves, or modifies the proposal. Approved or modified proposals are published in the tariffs and filed with the ICC to become effective in accordance with the provisions of Section 10762 of the Interstate Commerce Act, 49 U.S.C. § 10762.

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[1] Proposals of a minor nature to which no carrier or shipper objects may be automatically published in the tariffs and filed with the ICC.

Section 10762 sets forth detailed procedures for establishing and changing rates. Subsection (a) requires every carrier to publish and file with the ICC tariffs showing all of the rates governing the transportation it performs. Subsection (b) authorizes the ICC to prescribe the "form and manner" in which tariffs are to be published and filed. Subsection (c) provides that when a carrier proposes to change a rate, it must publish and file a notice of the proposed change 30 days before the proposed effective date. Subsection (e) provides that "the Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section."

Under the rule at issue here, the ICC proposed to use its 49 U.S.C. § 10762(e) rejection power to retroactively reject effective tariffs filed by rate bureaus, where there was "proof of significant violations" of approved ratemaking agreements. The ICC proposed to suspend and investigate the rates where there were "[a]llegations of lesser violations" (Pet. App. 66a). The Court struck down the proposed rule. It held that the ICC may not enforce the rate bureau provisions of the Act by rejecting or suspending tariffs "after the tariffs become effective" (Pet. App. 26a). Construing 49 U.S.C. § 10762(e), the Court noted that "the plain meaning of rejection is to refuse to receive" and that it has previously been held "that 'rejection is a regulatory device properly used only *prior* to a tariff's effective date, . . . [and] an investigation is the only mechanism available for challenging *effective* tariffs' " (Pet. App. 28a, emphasis in original). The Court further noted that "there are compelling reasons to re-

strict rejection to the period before a rate becomes effective" (Pet. App. 28a). It stated:

> Because a carrier may charge only the rates on file, and because rejection has the effect of declaring a rate void *ab initio* as if never filed, rejection necessarily carries with it a right to refund for overcharges (in the case of rate increases), measured always by the preexisting rate. This undermines the uniformity and reliability interests that the system of tariff filing was meant to foster (Pet. App. 28a, footnote omitted).

"Review of the statute, the major decisions, and policy," the Court said, "leads us to conclude that rejection or suspension after a tariff becomes effective is in conflict with the statute and thus may not be done either as an interpretation of the statutory powers or by independent rulemaking" (Pet. App. 29a).

DISCUSSION

Petitioners argue that the ICC has the authority to retroactively reject tariffs that have become effective in accordance with the Act's provisions for establishing rates, but which are subsequently found to have been established in violation of an approved ratemaking agreement. We believe that the Court of Appeals correctly rejected this argument. We agree with petitioners, however, that the decision below conflicts with that of the Court of Appeals for the Fifth Circuit in *Aberdeen & Rockfish R.R.* v. *United States*, 682 F.2d 1092 (5th Cir. 1982).

Under review in *Aberdeen* was the ICC's decision in Ex Parte No. 370, *Tariff Improvement*. There the ICC adopted a rule which would retroactively invalidate tariff increases that have become effective in accordance with the Act's provisions for establishing rates, but which are

subsequently found to have been established in violation of the ICC's tariff symbolization rules. The symbolization rules require tariff changes to be flagged by designated symbols to denote increases, reductions, or changes which result in neither increases nor reductions in charges. The Court sustained the ICC's rule invalidating missymbolized tariff increases. In so doing, it specifically rejected the argument that the ICC has no authority to retroactively invalidate a tariff after it has become effective. Thus, the conflict between the decision of the Eleventh Circuit below and the decision of the Fifth Circuit in *Aberdeen* is direct and irreconcilable.

One of the respondents here, National Motor Freight Traffic Association, Inc., and a group of railroads filed petitions for a writ of certiorari in the *Aberdeen* case, *National Motor Freight Traffic Association* v. *United States* and *Aberdeen & Rockfish R.R.* v. *United States*, Nos. 82-804 and 82-707. In their response to those petitions, the United States and the ICC noted the conflict between the decision below and the *Aberdeen* decision, and stated that they do not oppose the grant of the petitions. They suggested that it would be appropriate for the Court to defer consideration of those petitions until their petition in this case was filed so that the cases may be considered together.

We agree that a resolution of the issue presented in these conflicting decisions is of great practical importance. This Court has previously held that an effective tariff may not be disregarded or treated as nonexistent simply because of some tariff filing irregularity, thereby rendering the carriers strictly liable for refunds measured by the preexisting rates without regard to whether the shippers suffered any actual harm. *Davis* v. *Portland Seed Co.*, 264 U.S. 403 (1924); *Berwind-White Coal Min-*

ing Co. v. *Chicago & E. R.R.*, 235 U.S. 371 (1914). Yet, that is precisely the result that would be reached under the ICC's interpretation of its tariff rejection authority.

Such a result would have a devastating impact on the carriers. As NMFTA showed in its petition in *Aberdeen*, a single tariff change filed by a rate bureau may apply to shipments handled by more than 3,000 carriers. Rate increases resulting from such a change could easily amount to tens of thousands or even hundreds of thousands of dollars per day. Moreover, shippers would be encouraged to wait until the applicable three year statute of limitations has nearly run before instituting suits for overcharges. By waiting until the last minute, the shippers would save themselves nearly three years of increases, since they would be entitled to a refund of all charges in excess of those provided in the original tariff sought to be increased.

While we believe that the decision below properly precludes such a result, we agree that the present situation in which such a result is possible in some circuits but not in others is intolerable. Accordingly, we do not oppose the grant of the petition for certiorari here, provided that the petitions are also granted in *Aberdeen*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1983

ATTACHMENT

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Affiliates Of American Trucking Associations

American Movers Conference

Common Carrier Conference-Irregular Route

Contract Carrier Conference

Film, Air, & Package Carriers Conference

Munitions Carrier Conference

National Automobile Transporters Association

National Tank Truck Carriers, Inc.

Oilfield Haulers Association

Private Carrier Conference

Regional & Distribution Carriers Conference

Regular Common Carrier Conference

Specialized Carriers & Rigging Association

Steel Carriers Conference

Alabama Trucking Association

Alaska Trucking Association, Inc.

Arizona Motor Transport Association

Arkansas Bus & Truck Association, Inc.

California Trucking Association

Colorado Motor Carriers Association

Motor Transport Association of Connecticut, Inc.

Delaware Motor Transport Association

Washington D.C. Area Trucking Association

Florida Trucking Association, Inc.

Georgia Motor Trucking Association, Inc.

Hawaii Transportation Association, Inc.
Idaho Motor Transport Association
Illinois Trucking Associations, Inc.
Indiana Motor Truck Association, Inc.
Iowa Motor Truck Association, Inc.
Kansas Motor Carriers Association
Kentucky Motor Transport Association, Inc.
Louisiana Motor Transport Association, Inc.
Maine Motor Transport Association, Inc.
Maryland Motor Truck Association, Inc.
Massachusetts Motor Truck Association, Inc.
Michigan Trucking Association, Inc.
Minnesota Motor Transport Association
Mississippi Trucking Association
Missouri Bus & Truck Association
Montana Motor Carriers Association, Inc.
Nebraska Motor Carriers Association, Inc.
Nevada Motor Transport Association, Inc.
New Hampshire Motor Transport Association
New Jersey Motor Truck Association
New Mexico Motor Carriers' Association, Inc.
New York State Motor Truck Association
North Carolina Motor Carriers Association, Inc.
North Dakota Motor Carriers Association, Inc.
Ohio Trucking Association
Associated Motor Carriers of Oklahoma, Inc.

Oregon Trucking Association, Inc.

Pennsylvania Motor Truck Association

Rhode Island Truck Owners Association, Inc.

Motor Transportation Association of South Carolina, Inc.

South Dakota Trucking Association

Tennessee Motor Transport Association

Texas Motor Transportation Association

Utah Motor Transport Association

Vermont Truck & Bus Association, Inc.

Virginia Highway Users Association, Inc.

Washington Trucking Associations, Inc.

West Virginia Motor Truck Association

Wisconsin Motor Carriers Association

Wyoming Trucking Association, Inc.